U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 14 December 2006

BALCA Case No.: 2005-INA-00064
ETA Case No.: P2002-CA-095350601/JS

In the Matter of:

AMIE & RONALD BALDWIN,
Employers,

on behalf of

DELFICA ROSEMARY DIAZ-ALVARADO,
Alien.

Appearance: Susan M. Jeannette, Immigration Consultant
Del Mar, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record

STATEMENT OF THE CASE

On April 4, 2001, the household of Amie & Ronald Baldwin (the "Employer") filed an application for labor certification to enable the Alien, Delfica Rosemary Diaz-Alvarado, to fill the position of Head Housekeeper. (AF 279). Two years of experience in the job offered were required.

On February 17, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 273). The CO found that the application contained insufficient information to determine whether the skilled position of Head Housekeeper actually existed in the Employer's household or was created solely for the purpose of qualifying the Alien as a skilled worked under current immigration law, as there was no waiting list for skilled workers, whereas for unskilled workers the waiting list was over seven years. The CO noted that a housekeeper position is normally one which requires no more than three months of experience, and according to the Dictionary of Occupational Titles ("DOT"), almost all household positions are classified as "unskilled" because the occupations require less than two years of training, education and/or experience for proficiency. The exception, however, is the occupation of Household Manager, which can require up to two years of experience and thus is classified as a skilled position under immigration law. The Employer was directed to explain why the position of Head Housekeeper or Household Manager in the household should be considered a bona fide job opportunity. The rebuttal was to include, at a minimum, answers to a series of questions set forth in the NOF and the submission of federal income tax returns for the immediately preceding calendar year and W-2s for the Alien.

The Employer submitted rebuttal on March 11, 2004. The Employer submitted a Declaration signed by Amie Baldwin, W-2s for "Sandra Diaz" for 2000, the Employer's tax

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Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

returns, statements from the Employer regarding the Alien's job duties, and statements from the Employer's two other employees regarding their respective duties as babysitter and housekeeper. The Employer also provided other documentation of the services that the household required. (AF 208). In the rebuttal letter, the Employer explained that the Alien was working under an alias, using the name Sandra Diaz, and that the W-2 submitted only showed payment for six months because prior to that time the Alien was paid through a family-owned business. Subsequent to consulting with legal counsel, the Employer placed the Alien on the household payroll under her correct legal name. The Baldwins stated that they handle all cooking for the household, and that the Household Manager supervised the workers including the housekeeper, gardeners, dog groomer, periodic pest control workers, house maintenance workers, and babysitter. The Employer also asserted that the houseworker supervised food delivery and payment of these workers.

A Supplemental NOF was issued on March 31, 2004 because the CO found that the rebuttal did not provide sufficient information to document that the Head Housekeeper position existed in the Employer's household or that it was truly open to U.S. workers. (AF 268). Additionally, the CO found that the rebuttal submitted raised questions about whether the position presented included unlawful terms of employment in violation of Section 656.20(c)(7). The CO noted that the Employer had provided a statement that the Alien had previously been paid through their company under an alias and that after consultation with their legal counsel, the Alien was placed on the payroll of their private household under her legal name. While the Employer indicated that the most recent W-2 was attached, the only W-2 attached was for 2000, for a Sandra A. Diaz. The CO found that while the Employer showed that it had the ability to pay the offered salary, there was no documentation showing that wages had in fact been paid. The CO pointed out that household employers are required to register as such and arrange payment of Social Security tax, unemployment insurance and state disability insurance. Both the Alien and the house cleaner had earned enough income to require the Employer to report their wages to government authorities. The Employer was advised that if it could not document the payment of wages, it was questionable whether the position was truly open to U.S. workers.

The CO also questioned whether the position was actually live-in, given that the Alien listed the Employer's address as her own. The CO observed that the appearance that the Alien was a live-in suggested that the Head Housekeeper position was not truly open to U.S. workers. The Employer was directed to submit all Forms W-2 issued to the Alien for 2001, 2002 and 2003 and W-2 forms showing wages paid to the other two household employees, or if paid other than wages, to provide verifiable documentation, such as a record of the checks issued to these two workers. The Employer was also directed to explain, if the workers were not paid wages, how the job of Head Housekeeper was truly open to U.S. workers and to state if the Alien was living in the Employer's household in 2000 or 2001 or any time since then. If so, the Employer was directed to explain how the live-out position of head housekeeper was truly open to U.S. workers.

Finally, the CO directed the Employer to submit payroll records, and California DE 3BHW, Quarterly Report of Wages and Withholding for Employers of Household workers, or Federal Form 1040, Schedule H, in order to establish that unlawful terms and conditions of employment did not exist, pursuant to 20 C.F.R. §656.20(c)(7). If it was the Employer's contention that any of its workers were not employees, convincing documentation needed to be submitted, such as documentation showing the agency that employed them and the Employer's record of payments to that agency.

The Employer submitted rebuttal to the Supplemental NOF on April 22, 2004. (AF 95). The Employer stated that the housekeeper and babysitter were self-employed and were not employees of the household. With regard to the Alien being a live-in, the Employer contended that she was not. The Employer contended that its address was listed as that of the Alien because the Alien had been moving around a lot and did not have a fixed address at which to receive mail. The Employer further stated that the Alien, the housekeeper and babysitter had been paid in cash in the past, admitting failure to place the Alien, the housekeeper and the babysitter on a private household payroll. The Employer stated its willingness to hire a different housekeeper through an agency and to discharge the present housekeeper due to her lack of a valid Social Security number. The Employer also contended, however, that the housekeeper was self-employed, having other customers and being in control of her work schedule and hours. The

babysitter was a sixteen year old high school student taking care of the Employer's children on a less than part-time basis, and therefore, the Employer asserted it was not required to place her on a payroll or pay taxes on the wages she was paid. The Employer offered to do so, however, if it was required. The Employer indicated it was willing to pay all back pay and fines arising out of these violations, and was now in the process of setting up a payroll for their private household.

The Employer explained that there were no W-2s for 2001, 2002 and 2003, because the Alien had no Social Security number and the Employer did not want to continue using an alias to pay her. The Employer contended that there were no unlawful terms and conditions of employment, but the Alien was an illegal and because the ETA 750 was filed prior to April 30, 2001, the Alien would be eligible to be grandfathered under the former Section 245(i) of the Immigration and Nationality Act, upon approval and certification of the application. The Employer reiterated that the Alien was required to supervise the babysitter, the housekeeper and the other service providers in the household. The fact that these workers were not on the household payroll and were incorrectly treated as independent service providers did not eliminate the requirement of the need for these workers to be supervised by a Head Housekeeper.

A Final Determination was issued on June 16, 2004. (AF 92). The CO found that the Employer's first rebuttal had asserted that the Alien was placed on the payroll of the private household under her correct legal name, and yet there were no W-2s issued by the Employer to the Alien. While the Employer claimed that it was not possible to report the wages, there was no evidence that the Internal Revenue Service or the California Franchise Tax Board had turned down any reports of payroll from the Employer's household or any evidence of any household employee report of wages such as California DE3BHW or a federal Form 1040, Schedule H. No check stubs verifying payment to the Alien were provided. While the Employer claimed the other household workers were self-employed, the Employer also included a statement admitting liability for failure to report the wages and offering to pay penalties. The instant application was for an "employee" position and the Alien had apparently been in the job since 1997 with no record of payment of wages by the household employer. Thus, according to the CO, pursuant to 20 C.F.R. §656.20(c)(7), an unlawful condition of employment existed which precluded the granting of labor certification. The CO stated that the requirement that employers report wages

paid to household workers, whether the workers have a legal visa status or not, was not contingent on any immigration legislation. The lack of payroll for the Alien, who had been in the job for seven years, suggested that there was not a position for a U.S. worker, as required by 20 C.F.R. §656.20(c)(8).

The Employer's Request for Reconsideration and/or Appeal to the Board of Alien Labor Certification Appeals, dated July 12, 2004, was sent by certified mail on July 16, 2004. (AF 1, 174). The CO denied reconsideration on August 4, 2004, and the matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). An appellate brief from the Employer was received by the Board on December 20, 2004.

DISCUSSION

To summarize, the Employer has knowingly employed an illegal alien in their household since 1997. At first, they paid the Alien under a fictitious name (and apparently a fictitious Social Security number) through a company owned by the Employer. When advised by legal counsel that this was illegal, they started paying the Alien on a cash basis. It appears that the Employer did not apply to set up a formal payroll in compliance with tax, Social Security, and state unemployment insurance and workers' compensation laws until it was instructed by the California EDD to do so after filing the labor certification. The labor certification application is for the same job that the Alien has purportedly performed since 1997 – Head Housekeeper. The original NOF questioned whether this was a bona fide job opportunity because it appeared that the Employer was characterizing the position as a "Head Housekeeper" rather than just "Housekeeper" in order to qualify the Alien for a skilled visa. A supplemental NOF was issued based on information revealed in the rebuttal about the way the Alien was paid. The Final Determination denying certification was based on two grounds: (1) an unlawful condition of employment pursuant to 20 C.F.R. §656.20(c)(7), and (2) the Employer's failure to establish the existence of a bona fide job opportunity for the position of Head Housekeeper that is truly open to U.S. workers as required by 20 C.F.R. §656.20(c)(8). We address first the section 656.20(c)(8) issue because we find that it is dispositive of this case.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), the Board considered en banc the issue of how to determine whether an employer was offering a bona fide job opportunity for a domestic cook. Like, the instant case, the CO was suspicious about an employer who was applying for labor certification for a skilled domestic householder worker position, given that such jobs are rare, and there was a strong motive to try to characterize jobs as skilled to avoid the long wait for a visa as an unskilled worker. The Board wrote:

> Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. *Bulk Farms v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992); *Modular Container Systems, Inc.*, 89-INA-228 (July 16, 1991) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Modular Container Systems, Inc.*, 89-INA-228, *supra.* When an employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement. Thus, such an application raises the question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990. If a labor certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-skilled domestic positions that include cooking duties. Thus, we conclude that the CO acts properly in invoking section 656.20(c)(8) when he or she suspects mischaracterization of the job.
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> * * *
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> When applying the totality of the circumstances test to domestic cook applications, factual subjects that may typically be examined to determine whether the job is clearly open to a U.S. worker may include, *but are not limited to*:
>
> — the percentage of the employer's disposable income that will be devoted to paying the cook's salary
>
> — whether the employee will be engaged in cooking duties for a substantial portion of the day. A focus solely on whether the person occupying the

position will be gainfully occupied for a substantial portion of the work day, however, may overstate its importance. Although a basic forty hour week is typical of many employment environments, the custom is different for many employers

— whether the employee will be required to perform functions such as child care, general cleaning, or other non-cooking functions (and if not, how the employer accomplishes those functions)

— whether the employer employs other domestic workers

— whether the employer has retained domestic cooks in the past, and if not, what circumstances prompted the instant job offer

— the extent of the alien's training and experience as a cook, and whether such training or experience involved cooking in a domestic situation

— general indicia of the employer's credibility or lack thereof, such as the employer's level of compliance and good faith in the processing of the application (*e.g.*, whether the employer initially offered a wage far below the prevailing wage; whether the recruitment process indicates a good faith effort to find U.S. workers)

– general indicia of the position possibly being used to promote immigration (*e.g.*, whether the alien's work history shows any propensity of the alien to engage in domestic work? If the alien has cooking experience, is it of a nature that suggests specialized skill that an employer would be willing to engage the alien to do nothing but cook? An explanation of how the alien learned of the job offer. Whether the employer and the alien have a relationship by virtue of familial connection, friendship, or other circumstances indicating a special connection between the two)

— Any special circumstances of the household (*e.g.*, nutritional requirements – which would be most credible if supported by independent documentation such as a physician's statement supported by objective documentation)

Such details about the circumstances of the application are relevant, but the Board has observed that many domestic cook cases degrade into debate on how each minute of the day will be spent. In analyzing the circumstances, the trier of fact should focus on how the circumstances relate to credibility of the position description.

B. CREDIBILITY OF POSITION DESCRIPTION

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the

> totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

USDOL/OALJ Reporter at 5-7, 10-12 (footnotes omitted). In the instant case, the factors stated in *Carlos Uy III* suggest the type of inquiry that would be relevant to a Household Manager application, except that inquiries about cooking duties are obviously not the focus of attention here.

We begin our analysis by observing that there is no dispute in this case that the Employer has the ability to pay the salary offered. Nor do we question whether the Employer household has a bona fide position for a houseworker. The question, however, is whether they have a bona fide position for a skilled houseworker.

The Dictionary of Occupational Titles (DOT) definitions for a Household Manager and a General Houseworker are as follows:

> **301.137-010 HOUSEKEEPER, HOME (domestic ser.) alternate titles: manager, household**
>
> Supervises and coordinates activities of household employees in a private residence: Informs new employees of employer's desires and gives instructions in work methods and routines. Assigns duties, such as cooking and serving meals, cleaning, washing, and ironing, adjusting work activities to accommodate family members. Orders foodstuffs and cleaning supplies. Keeps record of expenditures. May hire and discharge employees. Works in residence employing large staff.
> *GOE: 05.12.01 STRENGTH: L GED: R4 M2 L3 SVP: 6 DLU: 77*
>
> **301.474-010 HOUSE WORKER, GENERAL (domestic ser.) alternate titles: housekeeper, home**
>
> Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and

> bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets.
> *GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86*

In the instant case, the Employer described the job as follows:

> Supervise, oversee, observe, instruct household workers such as the house cleaner, babysitters; carpet, drapery, furniture cleaners, window washers, pool and 3 gardening people; painter, maintenance and repair personnel. Accept deliveries. Shop for household inventory and food items. Keep record of expenditures.

(AF 279). We find that the position subject to this labor certification falls somewhere between the DOT definition of a Household Manager and a General Houseworker. The DOT definitions contain some commonality or similarity of duties; but a large distinction is that the Household Manager mostly assigns duties rather than personally performs them. Noteworthy in the DOT definition of a Household Manager is the presumption that the worker "[w]orks in residence employing large staff." There is no evidence in the Appeal File suggesting that the Employer has any permanent household staff other than the Alien. Rather, it is clear that the Employer engages a variety of contract services to meet the household's needs.

According to Ms. Baldwin's Declaration accompanying the rebuttal, the position involves supervising a housekeeper, gardeners, a dog groomer, periodic pest control workers and house maintenance workers, and a babysitter. (AF 212). According to the Declaration, the incumbent would supervise food delivery and "handle payment of these workers as authorized by Employer." *Id.* The incumbent, however, would not be involved in any child care, general cleaning or cooking functions. *Id.* According to a statement from Ms. Baldwin accompanying copies of receipts showing that the Employer actually engages some of these services, the Employer states that the Alien "is responsible for receiving daily delivery and signing for shipments received." (AF 216). Ms. Baldwin states that the Employer "need[s] her here during business hrs for many daily appts – elections –cable etc…" *Id.* The statement indicates that daily services include plumbing, plant and flower deliveries, landscaping, vacuum repair, and security services. *Id.*

We find that this information does not provide convincing evidence that the Alien is managing a household to the extent contemplated by the DOT definition of Household Manager. We can easily draw the conclusion that the Employer in fact has a need for a household worker to receive deliveries and watch over service workers. However, nothing about the Employer's statements or documentation establishes that the position actually involves assigning duties to the service workers. The statement that the Alien pays workers as authorized by the Employer is too vague to establish that the Alien is handling household staff expenses in a significant manner. In fact, it suggests that the Alien's role in making payments is limited. Moreover, the recitation of daily services appears to be an exaggeration. It is simply not credible to believe, for example, that the household requires frequent vacuum or plumbing repairs. The Appeal File simply does not establish what the Household Manager would be doing that requires two years of experience to be able to perform.

Thus, we are not convinced by the documentation of record that the Employer actually requires a skilled worker for the position for which labor certification is sought. Although the position might require more oversight of service workers than the DOT's General Houseworker definition suggests, the Employer has not established a need for a worker with two years of experience. Indeed, it may be observed that in this case the title "Head Housekeeper" is a bit of an oxymoron when the incumbent would be the only employee of the household.

The CO focused on the Employer's past history of failure to pay domestic workers in accordance with applicable state and federal employment, tax, and Social Security laws. Indeed, under the totality of the circumstances test, such history is a relevant factor. Undoubtedly, it places into question the Employer's credibility. Clearly the Employer knowingly engaged in dubious or even possibly illegal methods to pay the Alien for her work. When alerted about the problem with paying an illegal alien for domestic work under a fictitious name on the family business' payroll, rather than immediately determine the proper way to engage a domestic employee the Employer paid the Alien in cash. The Employer also admitted that it knew that the house cleaner was not a legal worker. Although the Employer has now agreed to clean up its act and pay any applicable back wages or fines, such a promise does not undo the fact that the

Employer was willing in the past to conveniently ignore legal requirements when it came to the employment of alien workers.[2]

Based on the fact that employers have a motive to mischaracterize domestic worker positions as requiring two years of experience in order to qualify the Alien as a skilled worker, that the record in this case does not contain convincing evidence that the position represented in the application as a Head Housekeeper actually involves significant management responsibilities or otherwise requires two years of experience as a minimum requirement, and that the Employer has a history of violations of law in the employment of alien workers, we affirm the CO's finding that the Employer failed to establish that it is offering a bona fide job opportunity that is clearly open to U.S. workers.

Because we affirm the CO under section 656.20(c)(8), we do not reach the question of whether the application could also be denied under section 656.20(c)(7).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

[2] The Employer's representative argued on appeal that the Employer is simply trying to take advantage of Congress' extension of Section 245i, which allowed certain aliens to adjust to legal status if they were the beneficiary of labor certification application filed prior to April 30, 2001. Although Section 245i was probably aimed more at allowing aliens to adjust status than at forgiving employers for past illegal employment practices, we acknowledge that this argument may have some relevance in regard to the section 656.20(c)(7) ground cited by the CO for denial of this application. Because we do not reach the section 656.20(c)(7) citation, however, we do not decide the relevancy of section 245i to the facts of this case. Rather, we are considering the Employer's past employment practices under section 656.20(c)(8) as a factor addressing the Employer's credibility as to whether the position was mischaracterized as a skilled position. The Employer's section 245i argument is not relevant or material to this credibility issue.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.